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Workmen's Compensation--Injury Arising Out Of and In the Course of the Employment--Horseplay and Practical Joking (McCarthy v. Remington Rand, Inc. 88 N.Y.S.2d 456 (3d Dep't 1949))

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Although the distinction between a *clear* and a *possible* chance would appear to be one readily perceived, the courts apparently have not always borne it in mind.[15] In the instant case, since the defendant had only two seconds in which to avert a collision, it is apparent that his opportunity of averting the injury could only be classified as a mere possibility. Since the defendant is only required to exercise reasonable care in averting the consequences of the plaintiff's negligence he cannot be regarded as negligent in failing to realize such a possibility. To hold otherwise would, under the guise of the doctrine of last clear chance, abrogate the rule of contributory negligence.

J. P. K.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—HORSEPLAY AND PRACTICAL JOKING.—This proceeding was instituted under the Workmen's Compensation Laws [1] by the widow of the deceased, a trucker in the employ of defendant, for an award of disability compensation and death benefits. Decedent's death was caused by his having drunk from a bottle labeled whiskey, but which contained a poison. The occurrence took place in the maintenance room of the employer's plant, during the decedent's working hours, on New Year's Eve. The evidence shows that general drinking from open view liquor bottles throughout the plant was customary at that time of the year because of the approaching New Year holiday. The evidence further indicated that the fatal episode was caused by decedent having been made the "butt of a joke" by his fellow employees. *Held,* for claimant. Decedent's death was due to "injuries from an accident which arose out of and in the course of his employment." *McCarthy v. Remington Rand, Inc.,* — App. Div. —, 88 N. Y. S. 2d 456 (3d Dep't 1949).

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who then applied the air brakes, but not in time to avert the injury. The plaintiff attempted to invoke the doctrine of last clear chance contending that, had the fireman jumped across the cab and applied the brakes himself, seconds would have been saved and the injury averted. The court held that the fireman's failure to apply the brakes was at most an error in judgment in an emergency for which the defendant could not be held liable).

[15] *See* Nielsen v. Richman, 68 S. D. 104, 299 N. W. 74, 76 (1941) (dissenting opinion); Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, 59 (1931) (dissenting opinion).

[1] N. Y. WORKMEN'S COMPENSATION LAW § 10, which requires every employer subject to the chapter to pay or provide compensation to his employees for their disability or death "arising out of and in the course of" their employment. This compensation is awarded without regard as to fault, except when the injury is caused wilfully or solely by intoxication.

At common law the duty of an employer to protect his servants was limited to certain specific minimum obligations, beyond which the servant was expected to assume all the risks of his employment.[2] The employer was not an insurer of safety, and he was not responsible for injuries caused solely by the negligence of fellow servants, as distinguished from the employer's own misconduct.[3] However, with humane changes in the social philosophy early in the twentieth century, the Workmen's Compensation Laws were created upon the theory of strict liability of the employer for injuries attributed to the risks of the employment.[4] In the main, in order that compensation be awarded under the New York Workmen's Compensation Law, it is necessary only that the employee's injury arise *"out of* and *in the course of* the employment." [5] The provision is a dual one and both requirements must be met; neither alone is sufficient.[6]

The workman is considered to be *in the course of* his employment when he is doing an act which he was employed to perform or is reasonably incidental to it.[7] Arising *out of* the employment means substantially that the injury arises out of conditions or hazards peculiar to the employment, as distinct from the general hazards of life.[8] It is not necessary that the risk be a foreseeable one against which a reasonable man would take precautions, since liability is not based on negligence.[9]

Although injuries sustained through horseplay which was done independently from the performance of any duty of the employment,[10] or in which the injured employee participated,[11] were once considered

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[2] PROSSER, TORTS § 67 (1941).

[3] The fellow servant rule appeared first in England in the case of Priestly v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837). It was adopted by the American courts in the case of Farwell v. Boston & Worcester Ry., 4 Metc. 49 (Mass. 1849).

[4] Laws of N. Y. 1914, c. 41.

[5] N. Y. WORKMEN'S COMPENSATION LAW §§ 2(7), 10. The ever-increasing liberalness of the New York courts in interpreting this clause over the past thirty years is strikingly portrayed when the decision in the instant case is compared with the case of De Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766 (1919), where the claimant, having left his bench to shake hands with a fellow workman who had been drafted, injured his hand in a machine and was denied recovery as having left the course of his employment when the injury occurred.

[6] Heitz v. Ruppert, 218 N. Y. 148, 151, 152, 112 N. E. 750, 751 (1916).

[7] Brown, *"Arising Out Of and In the Course of the Employment" in Workmen's Compensation Acts,* 7 WIS. L. REV. 15, 24 (1931), paraphrasing MECHEM, AGENCY 1461 (2d ed. 1914).

[8] Brown, *"Arising Out Of and In the Course of the Employment" in Workmen's Compensation Acts,* 8 WIS. L. REV. 134, 135 (1933), citing Mueller Construction Co. v. Industrial Bd., 283 Ill. 148, 118 N. E. 1028 (1918).

[9] See note 1 *supra.*

[10] See Note, 13 A. L. R. 540 (1921).

[11] Guarin v. Bagley & Sewall Co., 298 N. Y. 511, 80 N. E. 2d 660 (1948); Stillwagon v. Callan Bros., 224 N. Y. 714, 121 N. E. 893 (1918); De Filippis v Falkenberg, 219 N. Y. 581, 114 N. E. 1064 (1916); *cf.* De Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766 (1919).

to have been outside the scope of the Workmen's Compensation Laws, the courts have recognized exceptions. Compensation has been granted where an employee, injured by the horseplay of others, took no part in the fooling, but was attending to his duties at the time.[12] Moreover, some courts have taken the notably human view that certain kinds of foolery are normally to be expected when workmen are gathered together, and that the risk of injury from such horseplay is to be attributed to the work itself. "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow-workmen are not measured by the tendency of such acts to serve the master's business." [13] This latter exception is further amplified in the case of *Industrial Comm'r v. McCarthy,*[14] where the New York Court of Appeals expressed its opinion that if certain acts of foolery were *customary* or *usual,* they become, part and parcel, an incident of the employment; the court concluding that an employee participating therein is not separated from his employment, and injuries suffered thereby are compensable injuries arising out of the employment.

In considering the problem presented in the instant case, the court continued to apply the established liberal views. Taking into account that the pre-holiday spirit of festivity was bound to pervade the entire factory life as a natural incident of the employment, and that general drinking throughout the plant was *customary* at that time of the year, the court reasoned that since the risk of injury raised by the open view presence of the whiskey bottle containing poison had been brought about by authorized and other incidental rather than unauthorized conduct of defendant's employees, that therefore decedent, *in the course of* his employment, encountered a risk, which arose *out of* it.

S. E. A.

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[12] Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920); Verschleiser v. Joseph Stern & Son, 229 N. Y. 192, 128 N. E. 126 (1920); Markell v. Daniel Green Felt Shoe Co., 221 N. Y. 493, 116 N. E. 1060 (1917); Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152 (1918); Pekin Cooperage Co. v. Industrial Bd., 227 Ill. 53, 115 N. E. 128 (1917); Knopp v. American Car Foundry, 186 Ill. App. 605 (1914).

[13] Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 472, 473, 128 N. E. 711, 712 (1920).

[14] 295 N. Y. 443, 68 N. E. 2d 434 (1946).